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Issue Date: 07 October 2003

CASE NO.: 2003-LHC-1127

OWCP: NO.: 13-101734

In the Matter of

KEN BAKER,
Claimant,

v.

MANSON CONSTRUCTION COMPANY,
Employer,

EAGLE INSURANCE COMPANIES,
Carrier.

**DECISION AND ORDER DISMISSING CASE AS CLAIMANT IS EXCLUDED
FROM COVERAGE UNDER THE LONGSHORE ACT**

INTRODUCTION

This claim arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* ("the Act"). A formal hearing was held in San Francisco, California, on September 10 and 12, 2003. The parties called witnesses, offered documentary evidence and submitted oral arguments. Claimant's exhibits ("CX") 1 through 15 were admitted into evidence, with the admissibility of a videotape identified as CX 15 conditioned on the sound being muted. Employer's exhibits ("EX") 1-16 and 18-33 were admitted into evidence, exhibits 14 and 34 having been withdrawn. Administrative law judge exhibits ("ALJX") 1-11 were also admitted into evidence, with ALJX 9 and 10 referring to the closing briefs of Claimant and Employer, respectively, and ALJX11 referring to Claimant's reply brief as allowed due to the late-filing of Employer's closing brief. The findings and conclusions which follow are based upon my observation of the appearance and demeanor of the witnesses, and upon my analysis of the entire record, including all the documentary evidence, in light of the arguments of the parties, and the provisions and holdings of the applicable statutes, regulations, and precedents.

STIPULATIONS

The parties have stipulated and I find that:

1. Claimant was employed and ultimately injured upon the actual navigable waters of the Carquinez Strait;
 2. Claimant worked all of the time on Manson's fleet of vessels in navigation; and
 3. Claimant's duties at Manson contributed to the accomplishment of the Manson fleet's mission to complete the Shell Equilon Project.
- ALJX 9, p. 2.

THE ISSUES FOR DETERMINATION

The foregoing stipulations are supported by substantial evidence but they raise the following remaining issue for determination:

Should Claimant be excluded from coverage as a "member of a crew of a vessel" under § 2(3)(G) of the Act? Stated differently, did Claimant have a substantial connection both in duration and in nature to Manson's fleet of vessels in navigation while his duties contributed to the accomplishment of the fleet's mission at the Shell Equilan Project?

I hold that under the specific facts and circumstances in this case, Claimant's seaman status excludes him from coverage under the Longshore Act.

FACTUAL FINDINGS

A. The Parties

Claimant Ken Baker ("Claimant") is a 43-year-old former marine pile driver who was injured on July 25, 2001, while employed as pile driver or "pile butt" with Manson Construction Company ("Employer" or "Manson"). Manson is a Seattle-based marine construction contractor with branch offices in Houma, Louisiana, Richmond, California, and Long Beach, California. The company dredged harbors and channels, as well as built piers, wharves, docks, container terminals, bridges, harbor facilities and submarine pipe lines from Seattle to San Diego and Honolulu to Houma. Manson vice president Charles Gibson testified that approximately 95% of Manson's work is marine-based work on the water and that Manson's pile driver employees are expected to spend 100% of their time on marine-based projects. In addition, Gibson further testified that Manson never undertakes land-based jobs.

Claimant was hired by Manson's Richmond, California office to work on a marine pile driving project near the Shell Equilon Refinery Wharf in Martinez, California (hereinafter "Shell Equilan Project"). That wharf sits on the southern shore of the Carquinez Strait, just downstream from the Martinez-Benecia Bridge. It is used to load and unload the seagoing tank vessels which transport crude oil and petroleum products to and from the Shell/Martinez Refinery in Martinez, California. In the Spring of 2001, Manson was contracted "to salvage and rebuild" the wharf's downstream "mooring dolphin." A "dolphin" is a free-standing piling, or set of pilings, driven into the harbor bottom to support a mooring bollard. CX 3, pp. 5-21.

In the Spring of 2003, after a tug and barge collided with the downstream dolphin and knocked it over, the wharf's owner hired Manson first to salvage, reconstruct, and relocate the dolphin approximately 25 feet downstream including driving a cluster of 25 new piles. Claimant was hired to help drive the new piles in the second phase of that project, and the second phase was expected to last one month. The Shell Equilan Project foreman, William Hammond, testified that the pile driving could not be done on shore. He further testified that Manson had a difficult time driving piles due to soil conditions at the Shell Equilan Project and that the five pile drivers were hired to work as marine-based pile drivers and not as members of Manson's fleet crew.

B. Claimant's Employment with Manson

Because Manson's pile driving work at Shell Equilan took place offshore, the company deployed a small fleet of special purpose construction vessels to perform it including the derrick barge *Vasa* (a Coastguard documented vessel), the flat material barges *90* and *45*, the tug boat *Point Richmond*, the crew boat *Bub*, and several small skiffs and boats. The *Vasa* performed the pile driving and heavy lifting, and was not self-propelled or ever permanently connected to the shore during the Shell Equilan Project. The *Vasa* had its own power supply, radio, and a system to keep it offshore, and contained anchors, a bilge, buoys, and a below-deck watertight space containing a galley, sleeping quarters, washrooms, a water supply system, generators, fuel tanks, and lockers. This barge also had been to many locations over the years including Seattle, Honolulu, Oregon, and the Bay Bridge. The *90* and *45* barges delivered and stored the pilings and other construction materials, the *Point Richmond* pushed the barges around or they are moved by adjusting anchors. Claimant was never aboard the *Vasa* or the *90* or *45* Barges when they were moved to a new location. The *Bub* ferried the work crew to and from the project site, and the skiffs were small "rowboat" type vessels that the employees used to complete various tasks while balancing in the water.

Mr. Hammond hired Claimant on July 16, 2001---the same day Claimant reported to work---with the knowledge that Claimant had limited pile driving skills and that Claimant had not gone through a pile driver apprentice program like most other beginning pile drivers. Claimant was hired as a journeyman and paid as a pile driver rather than as a deckhand or crewmember. Claimant's job description called for him to "[a]ssist in offloading pile from trucks, assists in oiling, repairing and maintaining leads and pile hammer, assists in rigging and driving of pile via crawler crane or waterborne derrick barge by way of diesel or vibratory hammer[,]. ... [a]ssists in demolition of marine structures, including pile removal and deck removal[] ... [o]n occasion, one of the pile butts is required to climb the leads for inspection and greasing purposes...." EX. 33. Shell Equilan was Claimant's second job as a pile butt, and he had joined the Pile Drivers Union, Local 34 less than a year earlier in August of 2000, and had actually worked in the trade for less than six months.

Manson hired Claimant both as a favor to his father, long time Manson hand George Baker, and more importantly, because the company had difficulties finding qualified pile drivers given the active marine-based project work at the time and the severe shortage of qualified pile drivers in 2001 and 2002. Everyone agreed that all the bridge and seismic retrofit work underway in the Bay Area placed extraordinary demands on the Local 34 labor pool at that time

In fact, Employer's vice-president Charles Gibson testified that the years 2001 and 2002 were the busiest times for Manson pile drivers that he had seen his entire career and that Claimant was needed for Manson to fulfill a requirement to have a minimum crew to perform the work at the Shell Equilan Project. In addition to the inexperienced Claimant, Manson had to call two older hands out of retirement just to bring its Shell Equilan work gang up to the minimum required crew size. One of those retired hands, Odis Terry, was assigned to work with Claimant around the job at the time of the injury.

As was testified to at trial, the crew would show up at 6:30 a.m. and were ferried on the *Bub* to the *Vasa* where they would change into their work clothes and perform an eight hour shift, five days a week. Claimant worked on the barges, crewboat and skiff at all times during his eight workdays of employment with Employer. Claimant worked two days in the Point Richmond shipyard while the *Vasa* was moored at a dock. He mobilized the *90 Barge* and the *Vasa* for the project by lofting pile, setting chokers, loading supplies and equipment for the job and the vessels. The *Vasa* began at the Shell Equilan Project but was taken to Manson's Richmond shipyard to attempt to fix a problem with its pile driving equipment.

The *Vasa* with the *90 Barge* attached would be tugged out to the Shell Equilan Project without Claimant aboard. Claimant slept on land but worked on the water each day before he was injured. He would either drive to Point Richmond or Martinez depending on whether the *Vasa* was tied to the Manson's Richmond shipyard dock or anchored in the Carquinez Strait. Claimant never set or weighed anchor or tied up either vessel. At all times when Claimant was at the Shell Equilan Project, the *Vasa* remained anchored to the strait bottom and the *90 Barge* was always tied to the *Vasa*.

Claimant was required to wear a life jacket from the time he climbed on board the *Bub* and throughout the day on the *Vasa*, the *90 barge* and the skiff. Claimant was required to attend a safety class which addressed various sea perils including the threat of drowning, fire-at-sea, and falling overboard. EX 4; EX 30, pp. 208, 280, 282 and 311. Claimant and other pile drivers on the Shell Equilan Project were also instructed in various dangers and hazards such as in the barge listing back and forth, the strong currents of the Carquinas Strait, the wakes and waves caused by the winds, and other boats passing by the barges. In addition, slippery decks could pose a danger as well as occasionally being hit by anchors, and collisions with other vessels.

The Shell Equilan Project was to repair and relocate a mooring dolphin that had been struck by another vessel. Although ships when passing by the Shell Equilan Project were required to slow down, many would not and private boats were not subject to the slow down bell. Additional dangers to employees included the threat of being pinched either against a barge or equipment due to the wakes, waves, and wind. The Shell Equilan Project required that there always be a safety boat in the water as one of various safety precautions. Manson administered a safety policies and procedures manual to each of the employees on the Shell Equilan Project, including Claimant. EX 31, pp. 342-343. Mr. Hammond also testified that there was an unusually high amount of safety meetings for the Shell Equilan Project.

According to Mr. Hammond's and others' testimony, marine-based pile drivers for Manson were also asked to perform duties akin to those performed by members of a crew at sea

such as line handling, rigging and anchoring gear, running anchors, hooking up buoys, setting up navigational or anchor lights, and loading or unloading supplies or equipment for the fleet. Mr. Hammond recalled in particular seeing Claimant handle lines at Shell Equilan Project, ride in the crewboat, get on and off of the barges and skiff boat, and set up flashers on the outside of the *90 Barge* and the *Vasa*. Claimant did not refute any of this with his testimony and confirmed that he worked in the skiff one day to retrieve a cushion block that had fallen into the water. Supervisor Tim Smith testified that he saw Claimant do the same at the Shell Equilan Project.

Claimant testified that the Shell Equilan Project work he performed was subject to fire risks that were different than land fires, and that there was always a potential risk of collision from passing vessels. He also stated that lofting piles was more difficult in water than on land due to the listing of the barges, and anchor wires and mooring lines as well as slippery decks posed constant tripping hazards.

Consistent with Claimant's testimony, Odis Terry, a retired pile driver with no apparent loyalty to the case, credibly testified that Manson marine-based pile driver work was made more difficult than land-based work because things moved "all the time" which created hazards when slippery decks, waves, wakes, or winds or wind chop were combined with mooring and anchor lines and moving wires and hooks. According to Mr. Terry, Claimant was subjected to perils of the sea "everyday."

As to Claimant's employment with Manson, I find that Mr. Gibson's inconsistent testimony undermines Mr. Gibson's credibility as to his statements that Claimant would not have remained employed by Manson on some future marine-based project, especially given the widespread shortage of available pile drivers in 2001 and 2002. Ultimately, Claimant's employment was terminated at Manson because Claimant failed to pay his union dues and the collective bargaining agreement required Employer to terminate all employees with unpaid dues.

Mr. Gibson testified that Claimant had been hired with the hope that Claimant would work a long time but after viewing Claimant's work skills, he did not believe that Claimant would remain employed at Manson much longer. Claimant also testified that he expected permanent employment with Manson doing water work pile driving. Supervisor Tim Smith testified that he did not think Claimant tried to help others as he should and had a poor work performance before his injury. According to Mr. Terry, Claimant's work partner at the Shell Equilan Project who testified as an experienced pile driver, however, Claimant "was a good worker" and that "given enough time, anyone would be good at being a pile driver."

Mr. Gibson also stated that because Claimant had failed a drug screening for marijuana, Claimant would not have remained employed at Manson. Claimant had stayed employed at Manson, however, in a light-duty position in December 2001 after his injury and despite the failed drug tests on two separate occasions. Manson apparently had a history of keeping on injured workers in light-duty positions.

Mr. Gibson further testified that he was responsible for hiring and firing employees at Manson, but later testified that while he did not expect to keep Claimant on Manson's payroll if he had not been injured, the ultimate decision to keep Claimant employed at Manson was made

through Manson's Human Resources Department rather than by him. Mr. Gibson also admitted that he did not observe Claimant at any time while he worked at the Shell Equilan Project. As a result, I find Mr. Gibson's testimony lacks credibility.

C. The Accident

Claimant worked from July 16, 2001 through the early morning of July 25, 2001, when he was injured at work while lofting a pile. The first two days were spent out on the Shell Equilan Project aboard Manson's fleet where difficulties in pile driving caused the fleet to return to the Manson shipyard dock in Pt. Richmond for July 19 and 20, 2001. The fleet returned to the Shell Equilan Project on July 23, 2001 where Claimant worked until he was injured. After Claimant's injury, the pile driving phase continued until August 9, 2001 and the framing phase followed and the Shell Equilan Project ended on by August 24, 2001. Claimant testified that before his injury, he spent over 50% of his time with Manson on the Manson fleet out on the Shell Equilan Project in the Carquinez strait.

Claimant's accident occurred a little after 9:00 a.m. while Claimant and his co-workers were getting ready to "loft" a pile. Manson was building the new dolphin from pre-stressed concrete pilings. The pilings were delivered to the site aboard the 90 barge and then stored on her deck, alongside the *Vasa*, ready for use. When it came time to drive them, the *Vasa's* crane would swing to starboard over the 90's deck, hoist each new pile into its pile driving "leads," swing back to port and pound the pile into the bottom with a diesel powered hammer. Once the work crew got up to speed, this would become a streamlined, efficient procedure. On the morning of the accident, however, pile driving operations had just begun, and the crew had not yet found their rhythm. As a consequence, they only drove one pile between 6:30a.m., when work began, and 9:00a.m. Before they could drive a second, the *Vasa's* crane operator had to lift the hammer and leads off the first pile, swing the crane back over the 90 barge and loft the next pile.

Claimant and Odis Terry were standing aboard the 90 barge waiting to rig a new pile onto the *Vasa's* crane line so it could be hoisted upright into the leads. As the crane swung into position, pile driving foreman Tim Smith called out for one of them to check the draft marks on the pile that had just been driven. Claimant, being the junior man, responded. As he walked along the deck of the 90 barge, beneath the *Vasa's* crane, a "loftsman" aboard the *Vasa* cast a large, reinforced rubber hose loose from the leads overhead, and its coupling struck Claimant in the back of the neck, knocking him down to the deck. Immediately after the accident, Claimant walked 50 -60 feet on his own from the 90 Barge to the *Vasa's* galley in order to rest.

CONCLUSIONS OF LAW

1. Situs and Status

Claimant was injured aboard a vessel afloat on the Carquinez Strait. The parties have stipulated both that Manson employed Claimant upon actual navigable waters seaward of the *Jensen* line, and that he was ultimately injured there. As a result, I find that Claimant's July 25, 2001 injury fell within the general coverage requirements of §§ 2(3) and 3(a).

The determinative issue in this bifurcated matter is whether Baker should be barred from coverage by the "crew member" exclusion as set forth in § 2(3)(G).

2. The Crew Member Exclusion

After weighing all the evidence and considering the arguments of the parties, I find that Employer met its burden in establishing that it employed Claimant as a member of a crew. I base this finding on the U.S. Supreme Court decision in *Chandris v. Latsis*, 515 U.S. 347, 368 (1995). As will be discussed below, Claimant's reliance on the Ninth Circuit's decision in *Cabral v. Healy Tibbitts Builders, Inc.*, 118 F.3d 1364 (9th Cir. 1997) is misplaced as that case is factually distinguishable from the case at bar.

Initially, at the parties' request, I have taken official notice of the fact that Claimant filed a parallel seaman's suit in the United States District Court for the Northern District of California. 46 U.S.C.A. § 688.¹ I further note that Manson answered that suit by denying Claimant's seaman status. 46 U.S.C. § 181 *et seq.* According to the Joint Case Management Conference Statement both parties filed in District Court on August 1, 2003, "Manson anticipates filing a summary judgment motion on the issue of plaintiff's status as a Jones Act Seaman." In this case, however, the parties have reversed their positions. Claimant contends that he is a "maritime employee" within the meaning of § 2(3) of the Act and Employer counters that he should be excluded as "a member of a crew of a vessel" under § 2(3)(G). Since the District Court has neither tried nor decided Claimant's seaman status, this is the first tribunal to consider the matter, and accordingly my determination of the issue is not constrained by collateral or judicial estoppel. *See e.g. Figueroa v. Campbell Industries*, 45 F.3d 311, 315 (9th Cir 1995); *Sharp v. Johnson Bros.*, 973 F.2d 423 (5th Cir. 1992); *Roth v. McAllister Bros., Inc.*, 316 F.2d 143, 145 (2nd Cir. 1963).

I begin by noting that, even though the Longshore Act and the Jones Act have always been mutually exclusive, *McDermott Int'l v. Wilander*, 498 U.S. 337 (1991), the governing case law "permits the claimant to pursue both these remedies for the same injury, based on inconsistent claims as to his status at the time of injury." *Ryan v. McKie*, 1 BRBS 221, 224-225 (1974). The rationale, as one circuit has articulated, is that "[t]here is nothing sinister about a worker who claims to be physically disabled from injuries incurred during his employment, attempting either personally or through counsel, to obtain recovery by whatever lawful remedy or remedies are available to him." *Boatel, Inc. v. Delamore*, 379 F.2d 850, 854 (5th Cir. 1967). *See also, Simms v. Valley Line Co.*, 709 F.2d 409, 411 (5th Cir. 1983); *Biggs v. Norfolk Dredging Corp.*, 360 F.2d 360, 364 (4th Cir. 1969). *See gen. 4 Larson, Workmen's Compensation Law*, § 90.51, pp. 16-357 to 16-367 (1983). This Office, therefore, retains subject matter jurisdiction to award Longshore benefits even where the injured worker has filed a parallel Jones Act claim. *See also, Stubblefield v. Dutra Const. Co.*, 26 BRBS 774 (ALJ), 775 (ALJ) (1993); *Johns v. Davison Sand & Gravel*, 26 BRBS 583 (ALJ), 584(ALJ)-585(ALJ) (1992); *Grossman v. Weeks Marine, Inc.*, 26 BRBS 530(ALJ), 531(ALJ) (1992); *Kellerher v. Smith Rice Co.*, 24 BRBS 72(ALJ), 73(ALJ)-75(ALJ) (1990). Congress effectively codified

¹ In that district court action, Claimant, of course alleges that he is a "seaman," a position completely inconsistent to his argument in this case.

these points in 1984 when it amended § 3(e) of the Act to establish a Longshore credit for any amounts paid under the Jones Act. *Gizoni, supra*.

The determination concerning Claimant's seaman status is fact-specific, and will depend on both "the nature of the vessel, and the employee's precise relationship to it." *See McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991). The outcome of that fact-specific inquiry turns on a two-part analysis. *Chandris, supra*, 515 U.S. at 368. Before a claimant can be deemed a seaman, (1) his duties must contribute to the function of a vessel or to the accomplishment of its mission, and (2) he must have an employment-related connection to a vessel, or an identifiable group of vessels, that is substantial in both nature and duration. *Id.* Applying this analysis, I find and conclude that Claimant was a sea-based crew member, subjected to the perils of the sea, and not a land-based harbor worker.

a. *Contribution to the mission of an identifiable fleet of vessels.*

The contribution requirement "is very broad," *Chandris, supra*, and reaches "almost any workman sustaining almost any injury while employed on almost any structure that once floated or is capable of floating on navigable water." *Offshore Co. v. Robison*, 266 F.2d 769, 771 (5th Cir. 1959). Here, since both the Claimant and the *Vasawere* dispatched to the Shell Equilon Project to drive pile to repair and relocate a mooring dolphin, Claimant concedes and I find that his work as a pile butt contributed to that barge's mission or function. See ALJX 9, p. 2.

Similarly, though the *Vasa* and her sister barges lay at anchor throughout Claimant's employment on their slippery decks, "a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside." *Chandris, supra*, 515 U.S. at 373. "[T]he 'in navigation' requirement is used in its broad sense, and is not confined strictly to the actual navigating or movement of the vessel." *Johnson v. John F. Beasley Const. Co.*, 742 F.2d 1054, 1063 (7th Cir. 1984); *see gen.* 2 Norris, *The Law of Seamen* (4th ed.) § 30:13. Claimant therefore admits, and I find, that the *Vasa* and her sisters were "vessels in navigation" under the expansive Ninth Circuit test. *See e.g., Martinez v. Signature Seafoods, Inc.*, 303 F.3d 1132, 1137 (9th Cir. 2002) ("permanently moored" factory barge held vessel because it was still capable of transporting people or material over water); *Southwest Marine, Inc. v. Gizoni (Gizoni II)*, 56 F.3d 1139 (9th Cir. 1995) (floating work platform); *Estate of Wenzel v. Seaward Marine, Inc.*, 709 F.2d 1326, 1328 (9th Cir. 1983) (submarine cleaning and maintenance platform). *See also, Grubart v. Great Lakes Dredge & Dock*, 513 U.S. 527 (1995) (pile driving spud barge) *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.2d 344, 351 (5th Cir. 1998) (work-over spud barge). I likewise find that the barges and boats that Manson deployed at the Shell Equilan Project comprised an "identifiable fleet of vessels." *See Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.3d 1247 (3d Cir. 1994); ALJX 9, p. 2. Claimant therefore satisfies the first requirement of the two-part seaman test, and his seaman status remains dependent on the second or "substantial connection requirement."

b. Substantial Connection Both in Duration and Nature to a Vessel in Navigation

The main focus of this prong is the type of employment the worker is engaged in, and the connection to a vessel or group of vessels. The initial inquiry under this second prong is essentially whether the employee's duties take him or her to sea. *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535, 1540 (1997). Such a focus, the *Papai* Court noted, "will give substance to the inquiry both as to the duration and nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees. *Id.* The Court continued, "The substantial connection test is important in distinguishing between sea- and land-based employment, for land-based employment is inconsistent with Jones Act coverage." *Id.* at 1542-43. In *Chandris*, the Court enunciated the policy behind this "rule," stating: "The fundamental purpose of th[e] . . . substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection with a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995).

The *Chandris* Court went on to provide a rough measuring stick to determine whether or not a 'substantial connection' exists. The Court stated, "[A]n appropriate rule of thumb for the ordinary case . . . [is that] a worker who spends less than about [thirty] percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act," while "[a] maritime worker who spends only a fraction of his time working on board a vessel is fundamentally land-based and therefore not a member of the vessel's crew, regardless of what his duties are." *Id.* at 371

This substantial connection prong can be further understood by discussing some ambiguous language in *Chandris*, that led to the Court's *Papai* decision reversing the Ninth Circuit's *Papai* decision. In *Chandris* the Court stated: "We see no reason to limit the seaman status inquiry . . . exclusively to an examination of the overall course of a worker's service with a particular employer." *Id.* at 371-72 The Ninth Circuit, in *Papai*, interpreted that phrase to mean that courts could examine an employee's work history with different employers "during a relevant time period" to determine whether an employee mostly performed seaman duties. *Harbor Tug & Barge, Co. v. Papai*, 67 F.3d 203 (9th Cir. 1995), *rev'd*, 117 S. Ct. 1535 (1997). The Supreme Court reversed, holding that the *Chandris* statement meant that courts should limit their examination to only the employee's current duties with his or her employer and not consider the employee's past duties with that same employer.

Following the Supreme Court's rulings in *Papai* and *Chandris*, the Ninth Circuit stated "when we determine whether the nature of [a plaintiff's] connection to [the vessel] is substantial, we should focus on whether [the plaintiff's] duties were primarily sea-based activities. In both cases, the Supreme Court emphasized that the purpose of the substantial connection test is to separate land-based workers who do not face the perils of the sea from sea-based workers whose duties necessarily require them to face those risks." *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289, 1293 (9th Cir. 1997) (citing *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535, 1540 (1997); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995)). Thus, the current inquiry concerns whether an employee's current duties are sea-based.

The first post-*Papai* decision by the Ninth Circuit, *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289 (9th Cir. 1997) involved an employee who worked on a variety of land-based and sea-based projects for his employer. The plaintiff was working as the operator for a construction project at the Ford Island Ferry in Pearl Harbor at the time of his injury. The project involved removing and replacing mooring dolphins at a ferry. A mooring dolphin is a timber pile driven into the bottom of the harbor that cushions the ferry during landing. The plaintiff was assigned to operate the crane aboard a barge, and between August 15, 1994 and the date of the accident, he spent approximately ninety percent of his time working aboard the barge operating the vessel's crane. While the barge was not self-propelled, it could be moved up to 500 feet by manipulating its anchor lines. The plaintiff slipped and fell as he reported to work one morning and injured his lower back. The plaintiff subsequently filed a Jones Act claim.

The Ninth Circuit noted that it was not in dispute that the plaintiff met the first requirement of the *Chandris* test. The court, however, concluded that the plaintiff was a land-based worker with only a "transitory or sporadic connection" to the barge. The court noted that plaintiff was hired as a crane operator, not as a crew member, and that plaintiff was never aboard the barge when it was anywhere but the Ford Island ferry project. Additionally, plaintiff was not going to be working on the ferry after the project was completed. The Ninth Circuit concluded, "All of the evidence points to one conclusion: that [the plaintiff] was a land-based crane operator who happened to be assigned to a project which required him to work aboard [the barge]." *Id.* at 1293.

While this prong focuses upon the claimant's employment status, the title of the employee's job does not control. In *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991), the Supreme Court held that a maritime worker may not be denied seaman status under the Jones Act simply because his occupation is one of those enumerated in the mutually exclusive LHWCA. *Id.* at 88-89. This decision rejected the Fifth Circuit's reasoning in *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988), which held

that a worker whose occupation was clearly covered by the LHWCA could not, as a matter of law, be considered a member of the crew of a vessel.

As aforementioned, the "substantial connection" requirement requires duration of approximately thirty percent of the time on working aboard a vessel; this is not, however, a hard and fast rule. *See Viator v. Gordon's Trucking Co.*, 875 F. Supp. 369, 373 (D.C. La. 1995) (holding that a barge pilot who spent one-fifth to one-quarter of his time piloting a barge was eligible for Jones Act "seaman" status based upon a fact-specific examination). Additionally, one must analyze the nature of an employee's work, taking into consideration whether it is land based or includes exposure to the perils of the sea. By focusing on an employee's current employment, the *Papai* Court has helped clarify the otherwise muddled distinction between potential Jones Act plaintiffs and longshoremen.

In sum, whether the duration of a connection is substantial depends largely on the percentage of working time spent on vessels for the employer in question. *See Harbor Tug & Barge Co.*, 520 U.S. at 556-57; *Chandris*, 515 U.S. at 371- 72. Similarly, though other facts may come into play, whether the nature of a connection is substantial depends primarily on a single factor – specifically, whether the worker's duties "take him to sea." *Harbor Tug & Barge Co.*, 520 U.S. at 555. Under Ninth Circuit precedent, a worker's duties take him to sea if they are "inherently vessel related" or "primarily sea-based activities." *See Delange v. Dutra Constr. Co.*, 183 F.3d 916, 920 (9th Cir. 1998); *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289, 1293 (9th Cir. 1997).

Applying these principles to the facts of this case, I hold that Claimant was a seaman while employed on board Manson's fleet of vessels during the Shell Equilan Project. The parties stipulated that Claimant's duties contributed to the accomplishment of the fleet of vessels' mission of reconstructing the mooring dolphin on the Shell Equilan Project. Claimant performed deckhand duties and was subject to perils of the sea everyday as he handled lines, rode in the crewboat, got on and off of the barges and skiff boat, and set up flashers on the outside of the 90 *Barge* and the *Vasa*. Claimant directly faced constant perils of the sea including fire risks that were different than land fires. There was also a risk of collision from passing vessels. Claimant drove the skiff in the hazardous Carquinez Strait on at least one occasion. In addition, Claimant stated that lofting piles was more difficult in water than on land due to the constant listing of the barges while anchor wires and mooring lines posed ever present tripping hazards as did the slippery decks. Manson marine-based pile driver work was made more difficult than land-based work because things moved "all the time" which created hazards when slippery decks, waves, wakes, or winds or windchop were combined with mooring and anchor lines and moving wires and hooks.

Additionally, Claimant's connection to Manson's fleet of vessels was substantial in duration, since during the relevant period of employment with Manson, he spent 100% of his working time on Manson's fleet of vessels both at the Shell Equilan Project and the Pt. Richmond docking yard. Moreover, Claimant's connection to Manson's fleet of vessels, including the *Vasas* was substantial in nature. *See Endeavor Marine v. Crane Operators, Inc.*,

234 F.3d 287, 292 (5th Cir. 2000) ("[R]ead in context," the "going to sea" passage in *Cabral* and *Harbor Tug* is just a shorthand way of saying that "the employee's connection to the vessel regularly exposes him "to the perils of the sea.""). That Claimant's duties were "primarily sea-based activities" is evident from the fact that he spent 100% of his working time on board at least one of Manson's fleet of vessels and over 50% of his time on the fleet when it was anchored in the hazardous Carquinas Strait subject to the perils of sea referenced above. As aforementioned, the parties have also stipulated that in this case Manson's fleet of vessels were vessels in navigation.

Analysis of whether a maritime worker meets the duration element of the test focuses on the connection he has with his specific employer's vessel or fleet. The fact that he is a new employee is irrelevant. If so, any new hire whose future prospects with a company were uncertain might be denied seaman status even if his work was classic deckhand or blue-water seaman's work. This would also lead to the absurd result that a new hire performing precisely the same duties and exposed to the same marine perils as his experienced co-workers would not receive the same protections under the law. Such blatant inequity cannot be the law.

That Claimant was a seaman while employed at the Shell Equilan Project is not in conflict with the Ninth Circuit decision in *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289, 1293 (9th Cir. 1997). In *Cabral*, the claimant Cabral was hired to work a variety of construction projects, many of them land-based. Although one of these projects required him to serve as a crane operator aboard a barge, his activities were not "primarily sea-based," because many of his duties were performed on land. Thus, he did not satisfy the connection requirement. *Cabral*, 128 F.3d at 1293. In contrast, Claimant here spent 100% of his working time for Manson on board Manson's fleet of vessels performing activities that were either sea-based or constantly subject to the perils of sea. Furthermore, unlike Cabral, a crane operator who spent most of his day safely protected in his crane cab, Claimant in the instant case continuously had to adjust his work for the perils of sea and, many times, acted as a deckhand. Moreover, unlike Cabral, whom was left at his job site when the Barge 538 went to another job, Claimant was at all times assigned to the Manson fleet of vessels at the Shell Equilan job. In straightforward terms, while Cabral's work was minimally sea-based, the vast majority of Claimant's activities were sea-based.

In sum, I find that Manson has successfully established a crew member defense and find that Claimant's seaman status excludes him from coverage under the Longshore Act.

IT IS HEREBY ORDERED that this case is dismissed.

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California